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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 JOSEPH DURAN,) NO. CV 12-10599 SS
12)
12) Petitioner,) **MEMORANDUM DECISION AND ORDER**
13)
13) v.) **DENYING PETITION FOR WRIT OF**
14)
14) DAVID LONG, Warden,) **HABEAS CORPUS WITH PREJUDICE**
15)
15) Respondent.)
16 _____)
17)
18)
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20)

18 **I.**
19 **INTRODUCTION**
20

21 On December 11, 2012, Joseph Duran ("Petitioner"), a California
22 state prisoner proceeding pro se, filed a Petition for Writ of Habeas
23 Corpus ("Petition") pursuant to 28 U.S.C. § 2254 and a Memorandum of
24 Points and Authorities ("Pet. Mem."). On March 27, 2013, Respondent
25 filed an Answer to the Petition and a Memorandum of Points and
26 Authorities. Respondent also lodged the relevant portions of the record
27 from Petitioner's state court proceedings, including a two-volume copy
28 of the Clerk's Transcript ("CT") and a three-volume copy of the

1 Reporter's Transcript ("RT") from Petitioner's trial. On May 17, 2013,
2 Petitioner filed a Reply. All parties have consented to the
3 jurisdiction of the undersigned Magistrate Judge for final disposition
4 of this matter. Accordingly, for the reasons discussed below, the
5 Petition is DENIED and this action is DISMISSED with prejudice.

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7 **II.**

8 **PRIOR PROCEEDINGS**
9

10 On March 10, 2011, a Los Angeles County Superior Court jury
11 convicted Petitioner of second degree robbery in violation of California
12 Penal Code ("Penal Code") section 211, second degree commercial burglary
13 in violation of Penal Code section 459, attempted second degree robbery
14 in violation of Penal Code sections 211/664, and assault with a firearm
15 in violation of Penal Code section 245. (CT 308-11, 328-30; RT 1201-
16 03). The jury also found it to be true that a principal was armed with
17 a handgun during the commission of the offenses. (CT 308-11, 328-30;
18 RT 1201-03). On April 8, 2011, the trial court sentenced Petitioner to
19 eleven years in state prison. (CT 370-73, 378-79; RT 1509-11).
20

21 Petitioner appealed his conviction and sentence to the California
22 Court of Appeal, which affirmed the judgment in an unpublished decision
23 filed on April 25, 2012. (Lodgments A-D). Petitioner then filed a
24 petition for review, which the California Supreme Court summarily denied
25 on July 25, 2012. (Lodgments E-F).

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III.**FACTUAL BACKGROUND**

The following facts, taken from the California Court of Appeal's written decision on direct review, have not been rebutted with clear and convincing evidence and must, therefore, be presumed correct. 28 U.S.C. § 2254(e)(1); Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009).

On April 6, 2011, Albert Garcia met with [co-defendant Kekai] Larsen and [Petitioner] in Rosemead. They asked Garcia to drive them to the Santa Anita Mall. [Petitioner and Larsen] got into Garcia's car, along with a female. As the vehicle passed a business on Gidley Street in El Monte, [Petitioner and Larsen] told Garcia to stop because they wanted to "check it out." [Petitioner] got out of the car and looked at a large air compressor in the parking lot in front of the business. He unhooked a hose from the compressor. Larsen got out of the car. The business owner, Henry Franco, came outside and confronted them. [Petitioner] and Larsen approached him aggressively. Larsen demanded Franco's wallet. When Franco refused, Larsen lifted his shirt and showed him a handgun in his waistband. Franco handed over his wallet, and asked if he could have his wallet and identification cards back after the money was removed. He wrestled with Larsen to retrieve them. In the meantime, [Petitioner] went into the building and into Franco's office. When [Petitioner] emerged from the building, he and Larsen ran back to the car and Larsen told Garcia, "Take off."

1 Garcia saw that Larsen had a pistol on his lap. Franco wrote
2 down the license plate number of the car, and took the
3 compressors inside the building. He discovered that his
4 office had been ransacked and his cell phone was missing. In
5 addition, \$153 was taken from his wallet.

6
7 Garcia continued to drive the car to Arcadia. As they
8 were driving on a residential street, they saw Qiu Qim Sheng
9 walking her dog. [Petitioner] said, "I want to get that
10 dog." Garcia made a U-turn and drove past Sheng.
11 [Petitioner] jumped out of the car, grabbed the leash out of
12 Sheng's hand, and ran down the street with the dog. John
13 Gibbs was exiting a residence on the street and saw
14 [Petitioner] take the dog. Gibbs chased [Petitioner] for 50
15 or 60 yards and [Petitioner] let go of the leash and
16 continued to run. Garcia pulled the car up. According to
17 Garcia, Larsen got out of the car to assist [Petitioner].
18 Garcia heard gunshots coming from behind the car. Both
19 [Petitioner] and Larsen got in the car and Garcia drove off.
20 Gibbs said he saw [Petitioner] dive into the rear seat of the
21 car and then a person in the front passenger seat leaned out
22 of the car and fired at Gibbs, striking him in the leg.
23 Walter Quintanilla, who was driving down the street, saw a
24 man running towards a car. The man dove into the rear
25 passenger seat and then an arm came out of the car.
26 Quintanilla heard a gunshot. He could not tell whether the
27 person who jumped in the car was the one who put his arm out
28

1 of the window. He wrote down the license plate number of the
2 car.

3
4 Larsen and [Petitioner] told Garcia to drive them to El
5 Sereno. [Larsen, Petitioner] and the female got out of the
6 car and Larsen threw a bag of methamphetamine towards Garcia.

7
8 When Garcia arrived home at approximately 7:10 p.m. that
9 evening, he was detained by police. They found a glass
10 methamphetamine pipe in the car and methamphetamine in his
11 pocket. Garcia admitted that he had used methamphetamine
12 that day. Garcia told a detective that when he first picked
13 up [Petitioner and Larsen, Petitioner] sat in the front
14 passenger seat and Larsen sat in the rear seat on the
15 driver's side. After [Petitioner and Larsen] took Franco's
16 wallet, [Petitioner] got in the front seat again. Larsen was
17 the only one with a gun. Garcia told police that
18 [Petitioner] and Larsen were staying at a hotel about five
19 miles away from where the dog had been taken. Officers
20 responded to the hotel and detained [Petitioner and Larsen].
21 Franco identified both of them at a field showup and said
22 that Larsen was the one with the gun. The next day at a
23 photographic lineup, Franco did not identify either one.
24 Police performed gunshot residue tests on [Petitioner and
25 Larsen's] hands and the results were consistent with firing,
26 touching, or being around a firearm.

1 At the preliminary hearing, Franco identified
2 [Petitioner] but not Larsen. At trial, Franco identified
3 both men and Larsen as the one with the gun. He said he did
4 not identify Larsen at the preliminary hearing because he
5 feared for his life.

6
7 At trial, Garcia testified that the female sat in the
8 front passenger seat of his car. He admitted that he had
9 pled guilty to two misdemeanor counts and one count of being
10 an accessory after the fact. He acknowledged that he had
11 entered into an agreement with the district attorney's office
12 for leniency in exchange for testifying.

13
14 Gibbs testified that the person in the front passenger
15 seat leaned out and fired at him. He first described the
16 shooter as a "he," but could not identify anyone present in
17 court as the shooter. On cross-examination, he could not say
18 for sure whether the shooter was a male or female.

19
20 Neither [Petitioner nor Larsen] testified. Larsen
21 called one witness, Leandra Munoz, who testified that she saw
22 a Hispanic man wearing a blue shirt taking a dog from a woman
23 about 20 feet away. She said the man jumped into a car and
24 fired a gun at someone chasing him. She could not identify
25 either [Petitioner or Larsen] in court.

26
27 (Lodgment D at 2-4).
28

1 **IV.**

2 **PETITIONER'S CLAIMS**

3
4 The Petition raises two grounds for federal habeas relief. In
5 Ground One, Petitioner contends that the trial court erred when it
6 failed to stay his commercial burglary sentence pursuant to Penal Code
7 section 654.¹ (Pet. at 5; Pet. Mem. at 7-9). In Ground Two, Petitioner
8 contends that he received ineffective assistance of counsel when his
9 trial counsel failed to object to the trial court's erroneous reasoning
10 in sentencing Petitioner to consecutive sentences for robbing Franco and
11 burglarizing his business. (Pet. at 5; Pet. Mem. at 10-12).

12
13 **V.**

14 **STANDARD OF REVIEW**

15
16 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")
17 applies to the instant Petition because Petitioner filed it after
18 AEDPA's effective date of April 24, 1996. *Lindh v. Murphy*, 521 U.S.
19 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). "By its terms
20 [AEDPA] bars relitigation of any claim 'adjudicated on the merits' in
21 state court, subject only to the exceptions in §§ 2254(d)(1) and
22 (d)(2)." *Harrington v. Richter*, __ U.S. __, 131 S. Ct. 770, 784, 178

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25
26 ¹ Penal Code section 654(a) provides, in pertinent part, that "[a]n
27 act or omission that is punishable in different ways by different
28 provisions of law shall be punished under the provision that provides
for the longest potential term of imprisonment, but in no case shall the
act or omission be punished under more than one provision."

1 L. Ed. 2d 624 (2011). Under AEDPA's deferential standard, a federal
2 court may grant habeas relief only if the state court adjudication was
3 contrary to or an unreasonable application of clearly established
4 federal law or was based upon an unreasonable determination of the
5 facts. 28 U.S.C. § 2254(d).

6
7 Petitioner raised his pending claims in his petition for review to
8 the California Supreme Court, which denied these claims without comment
9 or citation to authority. (Lodgments E-F). The California Supreme
10 Court's discretionary decision to deny Petitioner's petition for review
11 without comment or citation to authority was not a decision on the
12 merits. See Greene v. Fisher, __ U.S. __, 132 S. Ct. 38, 45, 181 L. Ed.
13 2d 336 (2011) (state supreme court's decision not to hear an appeal is
14 not an adjudication on the merits under § 2254(d)(1)); Cannedy v. Adams,
15 706 F.3d 1148, 1158 (9th Cir. 2013) ("[D]enials of discretionary review
16 are not decisions on the merits[.]"), as amended, 2013 WL 3744048 (9th
17 Cir. 2013), pet. for cert. filed, 82 USLW 3247 (Oct. 13, 2013); Camper
18 v. Workers' Comp. Appeals Bd., 3 Cal. 4th 679, 689 n.8, 12 Cal. Rptr.
19 2d 101 (1992) ("[W]e reiterate the well-established rule in this state
20 that a denial of a petition for review is not an expression of opinion
21 of the Supreme Court on the merits of the case."). "Where there has
22 been one reasoned state judgment rejecting a federal claim, later
23 unexplained orders upholding that judgment or rejecting the same claim
24 rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803, 111
25 S. Ct. 2590, 2594, 115 L. Ed. 2d 706 (1991); see also Cannedy, 706 F.3d
26 at 1159 ("[W]e conclude that Richter does not change our practice of
27 'looking through' summary denials to the last reasoned decision -
28 whether those denials are on the merits or denials of discretionary

review.” (footnote omitted)). Thus, in addressing Petitioner’s claims, the Court will consider the reasoning of the California Court of Appeal, which issued a written decision addressing those claims. Berghuis v. Thompkins, 560 U.S. 370, ___, 130 S. Ct. 2250, 2259, 176 L. Ed. 2d 1098 (2010).

VI.

DISCUSSION

A. Petitioner Is Not Entitled To Habeas Relief For the Alleged Violation Of Penal Code Section 654

A federal court, in conducting habeas review, is limited to deciding whether a state court decision violates the Constitution, laws or treaties of the United States. 28 U.S.C. § 2254(a); Swarthout v. Cooke, ___ U.S. ___, 131 S. Ct. 859, 861, 178 L. Ed. 2d 732 (2011) (per curiam); Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Federal habeas corpus relief “does not lie for errors of state law.” Lewis v. Jeffers, 497 U.S. 764, 780, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990); McGuire, 502 U.S. at 67, 112 S. Ct. 475; see also Dugger v. Adams, 489 U.S. 401, 409, 109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989) (“[T]he availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution.”); Pulley v. Harris, 465 U.S. 37, 41, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984) (“A federal court may not issue the writ [of habeas corpus] on the basis of a perceived error of state law.”).

In Ground One, Petitioner contends that the trial court erred when it sentenced him to the high term of five years for the robbery of

1 Franco and also sentenced him to a one year consecutive sentence for the
 2 commercial burglary of Franco's business since the burglary sentence
 3 should have been stayed under Penal Code section 654. (Pet. at 5; Pet.
 4 Mem. at 7-9). However, this state law allegation fails to state a
 5 cognizable ground for federal habeas corpus relief. See Cacoperdo v.
 6 Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994) ("The decision whether to
 7 impose sentences concurrently or consecutively is a matter of state
 8 criminal procedure and is not within the purview of federal habeas
 9 corpus."); Watts v. Bonneville, 879 F.2d 685, 687 (9th Cir. 1989)
 10 (petitioner's claim that sentence violated Penal Code section 654 was
 11 not cognizable on federal habeas corpus review). Nor is this result
 12 changed by Petitioner's cursory references to due process and a fair
 13 trial.² (See Pet. Mem. at 7; Reply at 3); see also Langford v. Day, 110

15 ² Under narrow circumstances, the misapplication of state
 16 sentencing law may violate due process. See Richmond v. Lewis, 506 U.S.
 17 40, 50, 113 S. Ct. 528, 121 L. Ed. 2d 411 (1992) ("[T]he federal,
 18 constitutional question is whether [the sentencing error] is 'so
 19 arbitrary or capricious as to constitute an independent due process'
 20 . . . violation." (citation omitted)); Christian v. Rhode, 41 F.3d 461,
 21 469 (9th Cir. 1994) ("Absent a showing of fundamental unfairness, a
 22 state court's misapplication of its own sentencing laws does not justify
 23 federal habeas relief."). However, even if the Court ignored
 24 Petitioner's citation of only state law and interpreted Petitioner's
 25 vague references to due process and a fair trial as raising a federal
 26 constitutional claim, and even setting aside Petitioner's failure to
 27 exhaust Ground One as a federal constitutional claim, (see Lodgment E),
 28 Ground One would still fail. See 28 U.S.C. § 2254(b)(2) ("An
 application for a writ of habeas corpus may be denied on the merits,
 notwithstanding the failure of the applicant to exhaust the remedies
 available in the courts of the State."). As detailed below, the
 California Court of Appeal determined that the trial court appropriately
 applied state sentencing law, and as this Court is bound by the
 California Court of Appeal's interpretation of state law, Bradshaw v.
Richey, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005) (per
 curiam); Hicks on behalf of Feiock v. Feiock, 485 U.S. 624, 629-30 &
 n.3, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988), Petitioner cannot even
 show a misapplication of state law, let alone a due process violation.

1 F.3d 1380, 1389 (9th Cir. 1997) ("Langford may not . . . transform a
2 state-law issue into a federal one merely by asserting a violation of
3 due process."); Moore v. Chrones, 687 F. Supp. 2d 1005, 1040-41 n.27
4 (C.D. Cal. 2010) ("[M]erely placing [a due process] label on an alleged
5 state law sentencing violation is insufficient to state a cognizable
6 federal constitutional claim.").

7
8 **B. Petitioner Is Not Entitled To Habeas Relief On His Ineffective**
9 **Assistance Of Counsel Claim**

10
11 In Ground Two, Petitioner alleges he received ineffective
12 assistance of counsel when his trial counsel failed to object to the
13 trial court's erroneous reasoning in sentencing Petitioner to
14 consecutive sentences for robbing Franco and burglarizing his business.
15 (Pet. at 5; Pet. Mem. at 10-12).

16
17 **1. Background**

18
19 The California Court of Appeal set forth the following facts
20 underlying Petitioner's ineffective assistance of counsel claim:

21
22 [Petitioner] was sentenced to five years for the robbery
23 of Franco and a consecutive term of eight months for the
24 commercial burglary of Franco's business and another four
25 months for the principal armed allegation. After imposing a
26 consecutive term for the burglary, the court stated, "The
27 reason the court is imposing consecutive sentences is after
28 looking at California Rules of Court 4.125, the crimes were

1 predominantly independent of each other, the crimes involved
2 separate acts of violence, and the crimes were committed at
3 different times and different places." [Petitioner's]
4 counsel did not object. [Petitioner's] counsel had filed a
5 sentencing memorandum that did not address the imposition of
6 consecutive terms.

7
8 (Lodgment D at 8).

9
10 **2. California Court of Appeal's Opinion**

11
12 The California Court of Appeal concluded that Petitioner was
13 properly sentenced to consecutive sentences under Penal Code section 654
14 and, therefore, Petitioner's trial counsel was not ineffective in
15 failing to object to Petitioner's consecutive sentences for robbery and
16 burglary:

17
18 The record reflects that Garcia was told to pull over by
19 Larsen when they were on their way to the Santa Anita Mall.
20 Larsen told Garcia to stop while on Gidley Street and
21 [Petitioner] got out of the car to look at the air
22 compressors which were in the parking lot in front of the
23 building. While [Petitioner] and Larsen were in the process
24 of unhooking the hoses, Franco came out and verbally
25 confronted the two men. They then demanded his wallet, and
26 when Franco refused, Larsen showed him a handgun in his
27 waistband. Franco testified that [Petitioner] went inside
28 the building and into Franco's office while Larsen was

1 demanding Franco's wallet. While Franco gave his wallet to
2 Larsen, [Petitioner] came out of the office, and both men
3 left. It was then that Franco determined that his office had
4 been ransacked and a cell phone had been taken.

5
6 "Penal Code section 654 prohibits punishment for two
7 crimes arising from a single indivisible course of conduct.
8 If all of the crimes were merely incidental to, or were the
9 means of accomplishing or facilitating one objective, a
10 defendant may be punished only once. If, however, a
11 defendant had several independent criminal objectives, he may
12 be punished for each crime committed in pursuit of each
13 objective, even though the crimes shared common acts or were
14 parts of an otherwise indivisible course of conduct. The
15 defendant's intent and objective are factual questions for
16 the trial court, and we will uphold its ruling on these
17 matters if it is supported by substantial evidence."

18
19 * * *

20 [Petitioner and Larsen] stopped at Franco's business to
21 steal the compressors that were outside of the building.
22 While they were in the process of moving the compressors,
23 Franco came out and confronted them. It was then that
24 [Petitioner and Larsen] formed the intent to take Franco's
25 wallet and demanded that he relinquish it. When Franco
26 refused, Larsen displayed his gun and repeated the demand.
27 While Franco was being detained, [Petitioner] took the
28 opportunity to go inside the building and into the office,

1 obviously looking for something of value. There is no
2 evidence [Petitioner] knew Franco's office existed prior to
3 his entry into the building. Nor is there evidence that
4 [Petitioner] entered the building to facilitate the taking of
5 Franco's wallet.

6 * * *

7 . . . [Petitioner and Larsen] had accomplished the
8 robbery and did not form the intent to burglarize the office
9 until Franco was immobilized through Larsen's use of force.
10 There is substantial evidence that [Petitioner and Larsen]
11 had three separate objectives, each formed independently as
12 the events unfolded. First, they intended to steal the
13 compressors. Second, when Franco emerged from the building,
14 they formed the intent to rob him. Third, [Petitioner]
15 entered the building for the purpose of determining whether
16 other property could be seized. Based on the evidence, the
17 trial court reasonably concluded that burglarizing the
18 building was an afterthought brought about by the
19 confrontation with Franco.

20 * * *

21 As we have discussed, Franco's cell phone was not taken
22 during the course of the robbery. The burglary occurred at
23 a time and place separate from the robbery, the entry into
24 the office did not facilitate the robbery, and [Petitioner
25 and Larsen] had multiple, independent criminal objectives.
26 If [Petitioner and Larsen] had intended from the outset to
27 invade Franco's building in search of property, they would
28 have done so instead of attempting to take the compressors.

1 The imposition of consecutive sentences for the burglary and
 2 robbery was proper.^[Fn. 2]

3
 4 Fn. 2. Given our conclusion, [Petitioner's] claim that
 5 counsel was ineffective for failing to object to the sentence
 6 necessarily fails.

7
 8 (Lodgment D at 8-11 (citations omitted)).

9 10 **3. Analysis**

11
 12 "The Sixth Amendment guarantees criminal defendants the effective
 13 assistance of counsel." Yarborough v. Gentry, 540 U.S. 1, 4, 124 S. Ct.
 14 1, 157 L. Ed. 2d 1 (2003) (per curiam). To succeed on an ineffective
 15 assistance of trial counsel claim, a habeas petitioner must demonstrate
 16 both that counsel's performance was deficient and that the deficient
 17 performance prejudiced the defense. Williams v. Taylor, 529 U.S. 362,
 18 390, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); Strickland v.
 19 Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
 20 The petitioner bears the burden of establishing both components.
 21 Williams, 529 U.S. at 390-91; Strickland, 466 U.S. at 687. "To
 22 establish deficient performance, a person challenging a conviction must
 23 show that 'counsel's representation fell below an objective standard of
 24 reasonableness.'" Richter, 131 S. Ct. at 787 (citation omitted); Premo
 25 v. Moore, __ U.S. __, 131 S. Ct. 733, 739, 178 L. Ed. 2d 649 (2011).
 26 Prejudice "focuses on the question whether counsel's deficient
 27 performance renders the results of the trial unreliable or the
 28 proceeding fundamentally unfair." Lockhart v. Fretwell, 506 U.S. 364,

1 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993); Williams, 529 U.S. at 393
2 n.17. A court need not determine whether counsel's performance was
3 deficient before examining the prejudice the alleged deficiencies caused
4 the defendant. See Smith v. Robbins, 528 U.S. 259, 286 n.14, 120 S. Ct.
5 746, 145 L. Ed. 2d 746 (2000) ("If it is easier to dispose of an
6 ineffectiveness claim on the ground of lack of sufficient
7 prejudice, . . . that course should be followed" (quoting Strickland,
8 466 U.S. at 697)).

9
10 Here, the California Court of Appeal concluded that the trial
11 court's imposition of consecutive sentences for Petitioner's burglary
12 and robbery convictions was a proper application of California law, and
13 this Court must defer to the California Court of Appeal's determination
14 of state law. See Bradshaw v. Richey, 546 U.S. 74, 76, 126 S. Ct. 602,
15 163 L. Ed. 2d 407 (2005) (per curiam) ("[A] state court's interpretation
16 of state law, including one announced on direct appeal of the challenged
17 conviction, binds a federal court sitting in habeas corpus."); Hicks on
18 behalf of Feiock v. Feiock, 485 U.S. 624, 629-30 & n.3, 108 S. Ct. 1423,
19 99 L. Ed. 2d 721 (1988) ("We are not at liberty to depart from the state
20 appellate court's resolution of these issues of state law. Although
21 petitioner marshals a number of sources in support of the contention
22 that the state appellate court misapplied state law on these two points,
23 the California Supreme Court denied review of this case, and we are not
24 free in this situation to overturn the state court's conclusions of
25 state law."). Accordingly, because Petitioner was properly sentenced
26 under California law, Petitioner cannot show either that trial counsel
27 was deficient or that he was in any manner prejudiced because trial
28 counsel failed to make a futile objection to Petitioner's sentence. See

1 Jones v. Ryan, 691 F.3d 1093, 1101 (9th Cir. 2012) ("It should be
2 obvious that the failure of an attorney to raise a meritless claim is
3 not prejudicial[.]"), cert. denied, 133 S. Ct. 2831 (2013); Rupe v.
4 Wood, 93 F.3d 1434, 1444-45 (9th Cir. 1996) ("[T]he failure to take a
5 futile action can never be deficient performance.").

6
7 Accordingly, the California courts' rejection of this claim was
8 neither contrary to, nor an unreasonable application of, clearly
9 established federal law.

10
11 **VII.**

12 **CONCLUSION**

13
14 For the foregoing reasons, the Petition for Writ of Habeas Corpus
15 is DENIED. IT IS ORDERED that Judgment be entered dismissing this
16 action with prejudice.

17
18 DATED: December 13, 2013

19 _____
20 /S/
21 SUZANNE H. SEGAL
22 UNITED STATES MAGISTRATE JUDGE
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